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THE JURISDICTION OF THE COURT OF CHANCERY TO ENFORCE CHARITABLE USES.

(CONTINUED.)

In the reign of Queen Elizabeth the subject of Charities attracted more fully than before the attention of the legislature. It was thought expedient to establish a Board of Commissioners for Charitable Uses. The first statute regulating the subject is the thirty-ninth of Elizabeth, chapter six; the second was passed in the forty-third year of the same reign, chapter four. The true office and functions of these statutes was not to create a new authority, but to exercise an already existing jurisdiction in a new manner. This is shown

1. *From their terms and phraseology.* The first one shows most clearly the intention of the legislature. The preamble recites that charitable gifts, which are enumerated, had been and are still like to be *most unlawfully* and uncharitably converted to the lucre and gain of some few greedy and covetous persons, contrary to the true intent and meaning of the givers and disposers thereof; the end of the act being that the uses may from henceforth be observed and continued according to their true intent. It is then

provided, that the Chancellor may award commissions to the bishop of the diocese and other persons with a jury to inquire of such gifts and of the abuses, misdemeanors and frauds which have arisen, &c., so that the intent of the donor cannot be performed. The statute, 43 Elizabeth, is nearly like the first in its phraseology, although the reasons for enacting it are not so distinctly stated. This language is so clear in its meaning that Mr. Boyle says, that the statute *professes* to be a measure purely remedial, and that it leaves the original jurisdiction of the Court of Chancery as before.[1]

2. The subjects embraced within the statute lead to the same conclusion. Corporate foundations, as well as those which are unincorporated, legal gifts, as well as those which are equitable, are provided for. Thus a statute passed in the eighteenth year of Queen Elizabeth's reign[2] had exempted all manner of conveyances to the use of the poor from the statutes of mortmain, and had expressly enacted that it should be lawful to give to any person or corporation for their benefit, and yet the poor are mentioned in these acts in the same connection with other gifts and appointments of a charitable nature. These statutes apparently establish a power of visitation. There is no word or line in them which purports to create a *new capacity* to take property. When the legislature intended to give capacity they knew how to express themselves, as will be seen in the 18th Elizabeth just cited, explained by an act passed in the 39th Elizabeth, c. 5, immediately preceding one of those in question.

3. The decisions of the courts sustain this view. "Thus," says Duke, "the Commissioners cannot by their decree make a corporation not before incorporated, and enable them to take charitable uses as a corporation." They may, however, cause trustees to convey, from time to time, so as to keep up the number originally appointed. This, as has been seen, could have been done by the Court of Chancery without reference to the statute.[3] It is true

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[1] Boyle on Charities, p. 12.

[2] 18 Elizabeth, c. 3, § 9.

[3] Arnold *vs.* Barker, supra, p. 339.

that an unwarrantable extent was given to uses defectively created *in point of form*. This was through a forced construction of the words "given, limited, appointed, and assigned," employed in the statute in respect to the methods in which charities were created, and especially of the word "limited." The word "limited" enlarged the power of disposition,[1] and *the statute of wills*, as well as of mortmain, was, *pro tanto*, repealed or modified. But no statement is to be found that a *new capacity* to take property was created in the devise beyond modifying the restrictions of those statutes. No decision, it is believed, can be found, where the Commissioners were held to have acquired a power to establish a use which, before the statute of charities, by the general rules of equity jurisprudence would have been intrinsically void, nor does any case adjudged by the Commissioners go farther than Symond's case, before noticed.[2] Many defective *methods* of raising a valid use were, however, sanctioned. The peculiar cases arising under this statute were of this class. Damus' case was a will of personal property made by a married woman, who was administratrix. The will was void *at law*, because a married woman cannot make a will, but good by the statute of charities. It was her duty, as administratrix, to appropriate the property to pious uses.[3] Collison's case was a will made seven years before the statute of wills, to a charitable use. It was held to be a good "limitation" under the statute of charitable uses.[4] Many similar cases might be cited. On the question of capacity of unincorporated persons to take a charitable use, as devisees, the decisions do not appear to be different after the statute from those made before.

4. A similar conclusion may be derived from the nature of the Commissioners' authority. Matters appear to have come before the Chancellor, to have been in part disposed of by him, and then to have been referred to the Commissioners.[5] They were not an independent tribunal. It is true they could make a decree, but could not enforce it if it were disobeyed. They must call on the

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[1] Boyle on Charities, p. 18.

[2] P 339, supra.

[3] Sir F. Moor's Reports, p. 822.

[4] Moor's Rep. p. 888.

[5] Duke on Charitable Uses, 50

Chancellor to imprison the recusant party.[1] If they issued a summons to a party, and he refused to attend, they certified the fact to the Lord Chancellor. This functionary expressly declared in one case, as a reason why the party should appear before them, that otherwise the breach of *trust* would go unpunished, unless in *Chancery*, which were a *tedious and chargeable suit for poor persons.*[2] The object of the commission, probably, was to save expense by causing a summary inquiry to be made with a jury in the counties where the property given to charities was situated. It proved to be a piece of cumbrous machinery, and soon fell into disuse.

5. It was wholly in the discretion of the Chancellor to do what he saw fit in respect to their decrees. "Thus," says Moore, "it is in *the breast of the Chancellor* to award the commissions, or to confirm or annul the decrees, by which he can prevent or avoid their multiplicity perfectly well." It will be remembered that Moore penned the statute of charities.[3]

6. Shortly before the time of Queen Elizabeth it had been customary for the crown to issue special commissions to hear equity causes. This practice, originating in the reign of Henry VIII., was greatly resorted to at the close of the Queen's reign, on account of the illness of the Master of the Rolls, and the pressing nature of the Lord Chancellor's engagements. The Chancellor himself made similar delegations of authority, which were greatly complained of, and were the subject of a statute. These were only delegations of cases which the Chancellor could have heard if he had seen fit.[4] The statute commission of 43 Elizabeth is thus readily accounted for. It would have been simply impossible for the Chancellor to have heard the cases in the respective counties, and on so important a subject it was desirable that a commission should have the sanction of a statute. Besides, as the inquiry was to be by jury, legislation was absolutely essential.

For these reasons, among others, it is submitted that there is no reason to believe that the law of charities rests upon the statute of Elizabeth.

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[1] Duke on Charitable Uses, 158.

[2] Duke 69, 5 Car. I. Original edition.

[3] Rivett's Case, Moore's R. 890.

[4] Hargrave, Law Tracts, 310.

Informations in Chancery.

The question whether an indefinite charitable gift could have been enforced prior to the 43d Elizabeth by means of an information filed in Chancery by the Attorney-General, has elicited much discussion. This question is important in its bearing upon charitable gifts which were not valid at law. There is some direct evidence that such a proceeding was adopted. Probabilities are also in its favor. The reasons for this conclusion are,

I. Informations by a public officer were proper proceedings in Chancery long before the statute of Elizabeth. This might be inferred from the general analogies to be derived from proceedings in other courts, and can be shown by authority. Thus, in the Year Book, 1 H. VII., 18, it is said, that in certain cases, when a trespass is committed and an information is made in Chancery, a writ will issue for the farmer of the King and thus he will have the assistance of the King.

So in another case,[1] the Attorney of the King asked the Court to establish, by "mere surmise," the right of the King against one who was claimed to be seised to his use. It was urged in opposition, that the King should have his remedy by *subpœna* and not in this manner. The Chancellor agreed with this view, and said that, as the matter touched the Commonwealth of the realm for all time to come, a subpœna was necessary. The Attorney-General must have proceeded in such a case by an information.

In fact, at the close of the reign of Queen Elizabeth, informations had become so common that it was necessary to make a public statement that they did not abate by her death. All the Judges resolved that informations for the Queen in any "Latin Court," *should not* abate, but should be continued, and that all informations in the "English Courts" *do not* abate, because no continuances were necessary. It is superfluous to add that, the "Latin Courts" mean the Common Law Courts, and the "English Courts" embrace the Court of Chancery.[2]

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[1] Year Book, 4 H. VII. 5, case 10.

[2] Moore's Reports, p. 748. Demise le Roy.

Informations in Chancery were absolutely necessary to enforce a use in behalf of the King. The King could, as is well known, take a use. Thus Empson and Dudley were seised to the use of the King.[1] So Crompton says, "If one is enfeoffed to the use of the King, he shall have a *subpœna*, and though he is a *politic body*, he can take a use."[2] He must therefore have taken it in his public capacity, or as representing the public. No reason can be perceived why he could not take a charitable use which is public in its nature. All the King's Courts were open to him, and he had his election in which of them to sue, according to the nature of the case.[3] This is the rule at the present day. A *legal* right on the part of the public to a charitable use, can be enforced by information in Chancery.[4] A petition was filed in Chancery in the time of Henry VIII., by W. Whorehood, Attorney-General.[5]

II. An information in Chancery could be used to *establish* a title to wardship, and to determine what person should have the care of infants, at least of the "King's infants." The King was interested as "parens patriæ" in watching over those who were unable to protect themselves. It will be observed that this proposition bears closely upon our subject, for if the right of the *infant* could be in this manner established, no reason can be given why the royal protection should be withheld from the poor.

In the Year Book, 1 Ed. V., p. 6, an information of this kind was filed, upon which a subpœna was granted in the regular course of Chancery procedure. The case came before the Bishop of Lincoln, Chancellor, and Choke and Catesby, Justices. The information was filed by Townsend, Sergeant of the King, and it was stated to the Court, that one William Fowler, being possessed of the wardship of the body and the land of one S., granted his right to Davis, whose estate was confirmed by letters patent from the King. Pole, the defendant, having possession of the ward, was required by *subpœna* to bring him before the King in his Chan-

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[1] Statutes 1 H VIII. chap. 15.
[2] Jurisdiction of the Courts, p. 54.
[3] Year Book, 39 H. VI. 26, case 36.
[4] Attorney-General *vs.* Galway, 1 Molloy, 103.
[5] Hargrave's Law Tracts, 312.

cery. At the return day, Pole appears by his counsel, and claimed that the information was not sufficient to compel him to bring in the ward's person. It appeared in the discussion that the information was not sufficient, and the Justices state what it is necessary to show in order that the possessor of the ward shall be placed upon his defence. At that time, it seems if an "office" had not been found for the King, it must have been stated in the information, that the infant's ancestor had died in the homage of the King, or that the King had been in possession of the person of the ward. It was said by Choke, J., that such an information could be made by parol; that the party who filed it,[1] *that is, the guardian in fact*, can amend by parol a written information, and that when it becomes sufficient, the opposite party must respond. Then the ward is delivered to the Court, and the Court, who is "the third person," shall deliver him to one of the Masters in Chancery, in the custody of the Lord Chancellor, until the right is determined.[2] We are, unfortunately, deprived of an account of the rest of the case, because on the adjourned day "Richard Plantagenet claimed to be King of England, and on the same day proclaimed the day of his coronation, by force of which all the Courts of England were discontinued." The case proves, that informations were used to establish title to wardship; that the guardian in fact, claiming title, controlled the proceedings by making use of the name of the King. It was substantially a question between one supposed guardian and another. The *reasons* given for the interference were undoubtedly narrow.[3] The fact remains, that in *certain cases*, on general principles of equity jurisprudence, an information was proper to establish title to a ward. It is now settled that the jurisdiction of the Court is exercised by the Chancellor, as a part of the general delegation

[1] Such a person would now be called "relator." Nearly every principle now applied to informations in Chancery, is found in these old cases.

[2] The subject is spoken of by Choke as though it were perfectly familiar law There is proof that he was well acquainted with the rules prevailing in Chancery

[3] Dower could, at that time, be recovered in Chancery only in the case of "King's widows," or those whose husbands held directly of the King. Year Book 1 H. VII 18; 4 Id. 1.

of the authority of the Crown by virtue of his office, without any special warrant.[1]

The statement of Sir Joseph Jekyll seems, therefore, warranted by way of analogy. Speaking of the power of the King over infants, he says, "In like manner, in the case of charity, the King, *pro bono publico*, has an original right to superintend the care thereof, so that, abstracted from the statute of Elizabeth relating to charitable uses, and antecedent to it, as well as since, it has been every day's practice to file *informations* in Chancery, in the Attorney-General's name, for the *establishment* of charities.[2] Lord Somers had said before him, that there were several things which belonged to the King as *pater patriæ*, and fell under his care and direction, as infants, charities, &c.[3]

III. A like inference is to be drawn from the practice in the Star Chamber and Court of Wards. Crompton continually illustrates Star Chamber practice by that in Chancery. The defendant was called into that Court by subpœna.[4] Cases were presented on bill or *information* to the Chancellor, for the King.[5] When the proceeding was between one individual and another, it was by bill in analogy to suits in Chancery; in other cases, by information. The forms of practice are so much alike, that Crompton continually makes reference from one to the other. "For commission of rebellion, (see Chancery)."[6] A case of charitable uses was presented in the Star Chamber in the forty-fourth year of Elizabeth, concerning the poor of a parish.[7] This could not have been done under the statutes of Elizabeth, for the Star Chamber is not mentioned in the act, and must, as it would seem, have taken place by information, according to what has already been said of the sys-

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[1] Story's Equity Jurisprudence, Redfield's Edition, 1861, and cases cited.

[2] Eyre *vs.* Shaftesbury, 2 P. Wms. 119.

[3] Cary *vs.* Bertie, 2 Vern. 342.

[4] Crompton on the Jurisdiction of the Courts, written in 1594, p. 29.

[5] Id. p. 34. See bill ou information al Chauncellor pur le roy.

[6] Id. p. 32.

[7] Banister's Case in the Star Chamber, 44 Eliz.; Duke on Charitable Uses, Moor's Reading, 139.

tem of practice. The case was as follows: a gift was made to a parson and his successors to the use of the poor of the parish; the parson made a lease for *thirty* years; the lessee did not perform the use, and the *poor* made an entry. It was resolved that the *gift was good*, and that the lease for so many years was good also, notwithstanding the statute 13 Eliz. cap. 10,[1] because it could not tend to the impoverishment of the parson's successor, insomuch as it was given to a charitable use. This shows that the Court *established* the use, and also that it was regarded as a trust in the parson. Most of the Star Chamber cases of this kind would be decided by the Chancellor without assistance.

So in the Court of Wards,[2] informations were employed to establish uses in favor of infants who were wards of the King or Queen. The ordinary process in that Court was by bill, when an infant's rights were to be protected by information filed by the King's Attorney. In this manner the infant obtained a decree establishing his right against feoffees.[3]

IV. The policy and condition of England were altogether favorable to the enforcement of every gift in charity. At an early period there was an opportunity to test the principles of English Kings and Barons upon this topic. The great military order of Knights Templars had been dissolved, and the question arose whether the lands which had been given to them for the defence of the church and for "liberal alms-giving," (largitionem magnificam) should escheat to the King and divers other lords. The judges had been asked whether these lords could retain these lands by the law of the realm, and *with safe conscience*. They had warily and cautiously replied that they could retain them by

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[1] This statute prevented parsons, among others, from making leases in such a manner as to impoverish their successors. Any lease made by them could not exceed *twenty-one* years.

[2] This Court was created in the reign of Henry VIII. (32 Id. c. 46), to take oversight of the affairs of infants, "natural fools," &c., and this class of cases were withdrawn from Chancery while that Court continued.

[3] Boydell *vs.* Walthall, 33 and 34 Eliz., Moor Rep. 722; Georges *vs.* Stanfield, Id. 718; Forster's Case, Id. 717.

the law of the realm. Upon a great conference, it seemed good to these noblemen assembled in Parliament, for the health of their souls, and for the discharge of their consciences, that these lands should not escheat nor pass by inheritance to private persons, but that they should be devoted forever to the pious uses for which they were originally granted. The titles which had already vested at law were divested by this act,[1] and the lands were conferred upon the Brethren of the "Hospital of St. John of Jerusalem" to the same uses for which they were originally granted. This is a clear instance of the application of the principles of equity jurisprudence concerning charities. The great trusts were not to fail for want of a trustee. It is true that the power of Parliament was invoked, but the boundaries between the jurisdiction of the Courts of Equity and Parliament in respect to uses, were not closely drawn for a century or more afterwards. So, says Mr. Boyle, "when we find in books of ancient date applications talked of to Parliament, we naturally at the present day transfer our ideas to Courts of Equity as the more appropriate tribunals."[2]

The same principle was applied by the Court of Chancery in England at our revolution, when the College of William and Mary in Virginia had passed under our control. The college having ceased to be an English corporation,[3] a new arrangement was made in respect to charitable trusts previously held by it.

The condition of England for centuries made it her imperative duty to provide for the poor. Statutes were continually passed to arrest the evils growing out of the fact that "stalwart and valiant beggars" imposed upon the public, and the unfortunate poor had no means of support. A list of the statutes from the earliest period to the time of James I., will be found in our note.[4]

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[1] 17 Ed. II, stat. 2, A. D. 1324; 1 Statutes of the Realm, 194.

[2] Boyle on Charities, 267. See also 1 Spence Eq. Jurisd. 332.

[3] Attorney-General *vs.* Mayor of London, 1 Brown Ch. Cas. 171.

[4] See 23 E. III. c. 7; 7 R. II. c. 5; 12 do. c. 7, 8, 9, 10; 11 H. VII. c. 2; 19 do. c. 12; 22 H. VIII. c. 12; 27 H. VIII. c. 25; 28 H. VIII. c. 6; 31 H. VIII. c. 7; 33 H. VIII. c. 17; 37 H. VIII. c. 23; 1 Ed. VI. c. 3; 14 Eliz. c. 5; 39 Eliz. c. 4; 43 Eliz. c. 9.

The statesmen of that time were busily occupied with the perplexing problems concerning the care of the poor, even before the dissolution of the Monasteries. The first statute of Henry VIII. regarding them, was passed five years before any of the Monasteries were dissolved. The preamble speaks of "the great and excessive number of vagabonds and beggars." The second statute, passed before even the smaller Monasteries were broken up, provided for the collection of alms to be gathered upon every holy day or festival day by the churchwardens, for the poor and impotent sick, and no money was to be given in alms except so far as it was contributed in this way. All persons who were bound to pay sums in behalf of the poor could legally dispose of it in this manner. The statute is very extended and detailed, and shows that the dissolution of the Monasteries could not have been the cause of the beggary of the country, though it undoubtedly aggravated it.[1] Is it reasonable to suppose during this long period of years, while the State was straining every nerve to support the poor, teasing and *compelling* the people to be benevolent, allowing no Sunday of the year to elapse without a contribution in their behalf; can it be supposed, we say, that devises or legacies to this unfortunate class should be left without enforcement? It is morally certain that legislation would not have been delayed so long if there were no remedy by judicial decree. Donors of charities must have known, or must have supposed that a judicial remedy existed. Thus, in the year 1572, land was granted for charitable purposes to several feoffees, on their failure to *such persons as the lord keeper should decree upon complaint*, and on their failure, *to the use of the Crown to grant the same to charitable uses.*[2] Unless the Court of Chancery had an inherent jurisdiction upon this subject, can we imagine such a will to be made twenty-five years before the statutes of Elizabeth? The language seems to indicate the two-fold remedy by bill and information.

The statutes of Chantries cannot be urged against this view.

[1] Froude in his excellent view of the state of England at this period, takes this view. 1 Hist. pp. 74–84.

[2] Endowed Charities of London, p. 141.

Their object was to vest property given to superstitious uses in the Crown. It is true that the *language* of the first one, passed in the reign of Henry VIII., was far more sweeping. It would appear from its phraseology to have been the object to vest all charities in the King. This, however, was not the true intent of the legislature. Froude well explains it. The minds of men had been thrown into such a ferment by the dissolution of the monasteries, that they were seeking to resume all the property which they had previously devoted to charitable uses, &c. It was therefore a measure of policy to vest this property in the King, subject to a re-appropriation of it by him to charitable purposes.[1] The truth of this statement is evinced by the later statutes passed in the reign of Edward VI. and Elizabeth.[2] In these acts, the rights of the poor to any endowments were carefully protected, and in the latter one the Queen was authorized to convert property given for superstitious uses to charitable purposes. The ostensible design of the act was to reform charities, not to confiscate them. As Lord Coke says, in arguing Porter's case, "No time was so barbarous as to abolish learning, nor so uncharitable as to prohibit relieving the poor."

The decisions of the courts always conformed to this view; they distinguished between good and superstitious uses in the same instrument.[3] So, if a charitable and superstitious use were connected, and the principal object was charitable, it was upheld. Thus, where the use, upon a devise made in 12 H. VI., was to sustain poor men to pray for the soul of the dead, it was held that though the direction was superstitious, the use for the poor must be supported, and that it was valid.[4]

The inference is, that charitable uses of all kinds were established and enforced. There was a method in the law by which they could be established, and every inducement in the facts of England's condition to cause the method to be put in exercise.

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[1] 4 Hist. 486, 487.

[2] 1 Ed. VI. c. 14; 1 Eliz. c. 24, sec. 10.

[3] Partridge *vs.* Turk, Moor, 693, 38 Eliz.; Porter's Case, 1 Coke, 226.

[4] Case of the Skinners of London, 24 and 25 Eliz., in the Exchequer, Moor R 129.

The bearing of an authority showing that informations were used for the purpose of establishing charitable uses, may now be appreciated. It consists in a statement made by Sir Francis Moor, who penned the statute 43 Eliz., and whose "Reading" upon it is of the highest authority. He says: "There is given to the Lord Chancellor a directory, declaratory, additionary and compulsory power by this statute, which he may exercise upon complaint by a *party grieved*, that the commissioners have not pursued their authority. A party grieved is whosoever hath *bonum omissum*, or *malorum commissum*, by the decree, whosoever is interested, and hath a property and ownership of *goods* and *lands* to his own use—whosoever, by the decree, hath prejudice either in law or equity—is 'party grieved,' and may complain by bill." On examining the statute, it will be found that this is a correct exposition of it. The language is, that "a party grieved may proceed by bill." Sir Francis Moor proceeds: "*But* where the prejudice is common or general, there every man may complain as an *amicus curiæ*, not as a party grieved, as where lands are given to repair bridges or highways, which are public easements, any man may complain if the decree limit the use to any other purpose.[1] It will be observed that he does not say that this method is given by the statute, and it is not to be found there. No one is provided for in the statute but the party grieved. The remedy by complaint, as "*amicus curiæ*," must therefore have previously existed.

Now, complaint by any one, as *amicus curiæ*, is an information. Thus it was said in an early case in the Exchequer Chamber, by all the Judges, that any man can show a fact in a proper case to *any Court which the King has*, as *amicus curiæ*, or *amicus juris*, and every man can *inform* the Court, &c. And the Chancellor said, speaking of the case then before the Court, where the insufficiency of an office is evident, any man has a right to present the matter as *amicus curiæ*, but where it is not evident, then no one can present it except the party *grieved*, taking the same distinction in the year 1468 which was taken in reference to his own

[1] Moor's Reading on the Statute of Charitable Uses, Duke, 167. The reading is also to be found in the Appendix to Boyle on Charities.

Court nearly one hundred and fifty years later.[1] The information could be made either to the Justices or to the King's Attorney. Thus proclamation was made that if any one wished to inform the Justices or the Serjeants of the King for the King, they should be heard.[2] Sir Francis Moor then means to state that a *charitable use of a general nature could be presented to the Court of Chancery by information*, where the Commissioners had made an erroneous decree in establishing a charity. This statement is nearly contemporaneous with the statute of Elizabeth, for Moor wrote within less than seven years after it was enacted. Duke makes a statement, that an information was a proper proceeding as an original method in Chancery, to enforce a charitable use. It is common to treat his statement as of little value, because it was made many years after the statute of Elizabeth, but the authority of a contemporaneous writer of Moor's special ability in this particular branch of the law, cannot thus be discarded.

Symond's case[3] must have been decided upon similar principles. There was no *trustee*, because the bargain and sale was void for want of enrolment.[4] It was the case of a charity enforced after the statute of uses and before 43 Elizabeth, where no trustee was named, and must have been by information.

If any one denies that the Court had an original jurisdiction of this kind, he may be pertinently pressed with the question, when did the remedy by information in cases of charity arise? It has been shown that informations were known to early equity jurisprudence; that they were used to establish uses for the King; that rights of wardships were also acted upon, and uses belonging to infants in ward were thus enforced; that some charitable uses were established against the heir, which could have been enforced in no other way; that they were numerous enough at the close of the reign of Queen Elizabeth to justify a resolution by the Judges; that they were not *mentioned in the statute of Elizabeth*, but were

[1] Year Book, 7 Ed. IV. 16, case 11.

[2] Year Book, 20 H. VI. 38. The reporter adds, "But no one came."

[3] P. 339, supra.

[4] Statute 27 H. VIII. c. iv. 5.

at once employed to correct erroneous decrees made by Commissioners in establishing charities, and a few years later were common for the purpose of establishing charitable uses. Is there any other instance in the law in which a remedy sprung suddenly into existence? Are not all other remedies, unless given directly by statute, clearly of a historic character?

Finally, it is no slight argument in favor of this view, that the dicta of so many distinguished English Judges may be found in its favor. Though not authority, they are valuable as representing the traditions which had come down to them. Among these we find the names of Justice Bridgman, Lord Somers, Sir Joseph Jekyl, Lord Northington, Lord Hardwicke, Justice Wilmot, Lord Redesdale, and Lord St. Leonards. On the other side is Lord Loughborough, who mainly relies upon the negative evidence of Porter's case. In that case land had been devised to A *upon condition* to perform a charitable use. The condition was broken, by making a lease, and the heir of the devisor entered for the breach, and conveyed to the Queen, for the purpose of having the charity enforced, as some think, though apparently without reason. The Queen then brought an information in the Court of Exchequer, against the lessee, for intrusion. It is urged that if the remedy by information in Chancery had then existed, it would have been selected by the Queen's advisers instead of this circuitous process. It must, however, be remembered, that the heir had a legal right to enter for breach of a condition concerning charities. This right was given by an express statute already referred to.[1] It does not appear that he intended to have the charity enforced, but probably meant to claim his strict right. No trace of the present existence of the charity (Nicholas Gibson's) is to be found in the book called "Endowed Charities of London." If, then, all the weight is given to Porter's case which can possibly be claimed for it, it does not *contradict* the authorities or invalidate the arguments urged upon the other side of the question.[2] Even after the statute of Eliza-

[1] 13 E. I., c. 41.

[2] Lord Loughborough seems to talk at random of this case. He says the cause was tried upon an *ejectment* brought by the heirs, when the proceeding was insti

beth the heir could enter for breach of condition in cases of charitable uses. As it could not, for that reason, be urged that there was then no other method of procedure, so Porter's case does not prove that the method adopted there was the only one practicable.[1]

On the whole, we may safely agree with Lord Redesdale, when he says, in substance, that the King, as *parens patriæ*, calls upon his courts of justice to take care of those who cannot take care of themselves; not only of infants, but of the sick and impotent poor.[2] This is done in the regular course of judicial procedure.

It is commonly stated by the writers of text books, that gifts to unincorporated bodies are not to be enforced by the Court of Chancery *as such* unless a trustee is interposed, and a passage from Lord Eldon's opinion in the case of *Moggridge* vs. *Thackwell*, 3 Vesey 35, is usually cited to sustain this view: "The general principle thought most reconcilable to the cases is that where there is a general indefinite purpose, not fixing itself upon any object, *as this in a degree does*, (meaning the case before him,) the disposition is in the King by sign manual; but where the execution is to be by a trustee, with general or some objects pointed out, then the court will take the administration of the trust." Lord Eldon's meaning has been misapprehended. He was endeavoring to distinguish between cases where the intention of the testator could not be ascertained, and where it could be determined by *judicial interpretation*. Thus he said, in the same connection, that the will was in that case in a degree definite. The language of the will was, that the "executor was to dispose of the property in such charities as he thought fit, recommending poor clergymen who have large families and good characters." If such language is "in a degree definite," it is not difficult to understand what he meant by "an indefinite purpose." In another passage of the same judgment he says: "When money is given to charity generally, without trustees *or* objects selected, the

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tuted on behalf of the Queen. He must have explained Porter's case without examining it. Attorney-General *vs.* Bowyer, 3 Ves. 726.

[1] Berd *vs.* Robinson, New Benloe Rep. 171, (2 Car.)

[2] Id., 1 Bligh N. S. 347.

King is constitutional trustee," thus intimating that where either was designated, the charity could be enforced by the court. Besides, if he had any other meaning, his statement is not *exhaustive*, for he does not include in his propositions, in any form, the case where the object was measurably *definite*, such as the poor of a parish, and no trustee was selected. This can be readily perceived by a careful perusal of the passage.[1] The reporter undoubtedly has failed to give his exact language. The passage perhaps should read, "except that where the execution is by a trustee, with general or some objects pointed out, the court will execute the trust." The statement is then symmetrical, consistent with other parts of the judgment, in harmony with his main argument, and is confined to general and indefinite gifts. His proposition is at best a mere dictum, to which undue weight has been attached, for he lays no stress upon it himself, and is characteristically dissatisfied with it. The authorities and the reason of the thing are essentially opposed to the idea that a trustee is necessary. There is a crowd of decisions that sustains the doctrine, that if a trustee dies before the testator, or is removed before his death, the court will execute the trust, though only the shadow remains.[2] Is it, then, reasonable, if the *intent was clear* and no trustee happened to be named, that a different conclusion should be reached? Truly, as Justice Wilmot says, "that would be too fine a thread to hang this matter upon."[3] But there are distinct authorities both before and after the statutes of Elizabeth in favor of holding the heir as trustee. Nothing can be more decisive than Symond's case before noticed. The following cases, after the statute, have been noted: A testator had appointed that lands and goods should be sold for charitable uses, but did not say by whom the sale should be made; the sale was decreed.[4] This took place under the *first* statute. The result after the statute was precisely the same as that in Symond's case before. So where a devise was made to a curate,

[1] Moggridge *vs.* Thackwell, p. 83.

[2] The cases are collected in Hill on Trustees, 451.

[3] Wilmot's Opinions, p. 23.

[4] Steward *vs.* Germyn, 41 Eliz., Duke, 79, case 22.

and to all that should serve the cure after him, though the curate was not able to take by devise, for want of being incorporate, and having succession, yet the Lord Chancellor (Nottingham) decreed that the heir of the devisor should be seised in trust for the curate for the time being.[1] Other cases have been cited of a similar nature. As soon as the trust was established, the court could regulate the charity and appoint new trustees from time to time, decreeing new conveyances.[2]

When the charity is purely indefinite, such as the poor at large, and no trustee is interposed, it can only be enforced by the exercise of prerogative power. Upon whatever theory the English monarch delegates this power to the chancellor, it clearly could not be adopted under our system of jurisprudence. The function of the courts is to ascertain the meaning of the testator by well-settled rules of interpretation. When the intention cannot be learned in this manner, their duty is at an end; conjecture is not to take the place of science. When interpretation ends, prerogative begins; but this authority is not to be assumed by the courts. Similar reasons would cause us to discard that peculiar *cy pres* doctrine by which funds given in support of a charity, in case that it is illegal or impracticable, are *perverted* from the design of the founder, under pretence of observing his general intention. Though this was the rule at common law, the "general intention" of the testator is not, as a matter of principle, the subject of judicial cognisance. But no difficulties, growing out of a want of corporate capacity or of the want of a technical trustee, should stand in the way of effectuating the well-ascertained intention of the donor. When the charity is *altogether* indefinite, it is not enforced even in England.[3]

(TO BE CONCLUDED IN THE NEXT NUMBER.)

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[1] 2 Ventris, 349. In Chancery.

[2] Hill on Trustees, passim.

[3] The cases of this kind are collected in 13 Beavan, 89, 90, 91.